

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**May 18, 2021**

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CARLOS A. VELASQUEZ,

Plaintiff,

v.

STATE OF WASHINGTON;

WASHINGTON DEPARTMENT OF

CORRECTIONS,

Defendant.

No. 2:20-CV-00137-SAB

**ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

Before the Court is Defendant's Motion for Summary Judgment, ECF No. 13. The motion was considered without oral argument. Plaintiff is represented by Richard Wall and Defendant is represented by Nicholas Ulrich.

Defendant requests that the Court grant summary judgment on both of Plaintiff's claims and dismiss the case. In response, Plaintiff concedes that summary judgment is appropriate for his claim under 42 U.S.C. § 1983. However, Plaintiff argues that there are genuine disputes of material fact which preclude summary judgment on his negligence claim. For the reasons discussed below, the Court grants in part and denies in part Defendant's motion and remands the case to state court.

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**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT # 1**

## Background

The following facts are taken from Defendant's motion, Plaintiff's response, and the parties' respective statements of material fact, but are construed in Plaintiff's favor. ECF Nos. 13, 14, 22, 23.

On February 27, 2017, Plaintiff Carlos Velasquez was an inmate at the Airway Heights Corrections, a state prison run by Defendant Washington State Department of Corrections. At the time, Plaintiff's cellmate was Kent Whiting ("Mr. Whiting"). Both Plaintiff and Mr. Whiting were in the N-Unit of Airway Heights.

Every afternoon, Airway Heights performs a mandatory lockdown and "count" of the inmates. During the count, corrections officers pull some inmates out of their cells to do random urinalysis ("UA") tests for prohibited substances. If an inmate refuses to comply, they are automatically infracted. On February 27, 2017, Plaintiff and Mr. Whiting were pulled out of their cell during the count for UA testing after corrections officers found a broken light bulb in their cell, raising suspicions of drug use. Both Plaintiff and Mr. Whiting refused to comply with UA testing and thus were infracted before they returned to their cell.

Each unit in Airway Heights has a Unit Booth, which controls and oversees the cells in the unit. In the N-Unit, each cell has a button above the toilet below the intercom. If the inmate presses the button while the unit is not in lockdown, the button will open the cell door. However, if the inmate presses the button while the unit is in lockdown, the button will sound an alarm in the Unit Booth. On February 27, when Plaintiff and Mr. Whiting were returned to their cell after being infracted, Mr. Whiting began threatening Plaintiff. Specifically, Mr. Whiting stated that he was going to break Plaintiff's face, beat him up, and knock him out if he told corrections officers that the lightbulb belonged to Mr. Whiting. At the time of the threat, the N-Unit was still on lockdown for the count. But when Plaintiff tried to

1 press the button in the cell to sound the alarm in the Unit Booth and thereby call  
2 officers for help, no one came.

3 After the lockdown ended, Plaintiff left the cell and went to the correction  
4 officers' office. Plaintiff told the officer that he was being threatened by Mr.  
5 Whiting and that he was afraid to return to his cell. The officer told Plaintiff to go  
6 back to his cell. When Plaintiff repeated his fears, the officer put his hand on his  
7 pepper spray canister and asked if Plaintiff was refusing to return. Plaintiff then  
8 returned to his cell.

9 Shortly after Plaintiff returned, Mr. Whiting attacked Plaintiff by repeatedly  
10 punching him in the face. Plaintiff was taken to the prison medical unit for  
11 treatment, but was then transferred to the local emergency room where he received  
12 eight to ten stitches for a cut under his left eye. Additionally, as a result of the  
13 assault, Plaintiff suffered multiple fractures to his left cheek bone and nerve  
14 damage on the left side of his face.

15 Plaintiff originally filed his complaint in Spokane County Superior Court on  
16 March 12, 2020. ECF No. 1-3. In his complaint, Plaintiff asserted two claims: (1)  
17 negligence under state law; and (2) violation of the Eighth Amendment under 42  
18 U.S.C. § 1983. *Id.* at 3. On April 1, 2020, Defendant removed the case to federal  
19 court on the basis of federal question jurisdiction. ECF No. 1 at 2. The Court set a  
20 jury trial date of June 7, 2021. ECF No. 6.

21 Defendant filed the present motion on February 26, 2021. ECF No. 13. On  
22 May 5, 2021, due to the pending dispositive motion and the impending trial date,  
23 the Court struck the trial date until after the motion was decided. ECF No. 31.

### 24 Legal Standard

25 Summary judgment is appropriate "if the movant shows that there is no  
26 genuine dispute as to any material fact and the movant is entitled to judgment as a  
27 matter of law." Fed. R. Civ. P. 56(a). There is no genuine issue for trial unless  
28 there is sufficient evidence favoring the non-moving party for a jury to return a

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT # 3**

1 verdict in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250  
2 (1986). "An issue of material fact is genuine 'if there is sufficient evidence for a  
3 reasonable jury to return a verdict for the non-moving party.'" *Thomas v. Ponder*,  
4 611 F.3d 1144, 1150 (9th Cir. 2010) (quoting *Long v. Cty. of Los Angeles*, 442  
5 F.3d 1178, 1185 (9th Cir. 2006)). The moving party has the initial burden of  
6 showing the absence of a genuine issue of fact for trial. *Celotex Corp. v. Catrett*,  
7 477 U.S. 317, 325 (1986). If the moving party meets its initial burden, the non-  
8 moving party must go beyond the pleadings and "set forth specific facts showing  
9 that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248.

10 In addition to showing there are no questions of material fact, the moving  
11 party must also show it is entitled to judgment as a matter of law. *Smith v. Univ. of*  
12 *Wash. Law Sch.*, 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is entitled  
13 to judgment as a matter of law when the non-moving party fails to make a  
14 sufficient showing on an essential element of a claim on which the non-moving  
15 party has the burden of proof. *Celotex Corp.*, 477 U.S. at 323. The non-moving  
16 party cannot rely on conclusory allegations alone to create an issue of material fact.  
17 *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993).

18 When considering a motion for summary judgment, a court may neither  
19 weigh the evidence nor assess credibility; instead, "the evidence of the non-movant  
20 is to be believed, and all justifiable inferences are to be drawn in his favor."  
21 *Anderson*, 477 U.S. at 255; *Cortez v. Skol*, 776 F.3d 1046, 1050 (9th Cir. 2015).

## 22 Discussion

23 Defendant argues that the Court should grant summary judgment in its favor  
24 and dismiss both of Plaintiff's claims. With respect to Plaintiff's Eighth  
25 Amendment claim, Defendant argues that Plaintiff fails to state a claim because a  
26 state agency such as the Washington Department of Corrections does not constitute  
27 a "person" within the meaning of 42 U.S.C. § 1983. ECF No. 13 at 10. As for  
28 Plaintiff's negligence claim, Defendant argues that Plaintiff cannot establish

1 Defendant's breach of duty because there is no genuine dispute of material fact that  
2 Mr. Whiting "simply snapped" in assaulting Plaintiff, and therefore Defendant had  
3 no notice of the impending injury. *Id.* at 5-8.

4 In response, Plaintiff states that he does not object to the Court granting  
5 summary judgment on his § 1983 claim. ECF No. 23 at 3-4. However, Plaintiff  
6 argues that there are genuine disputes of material fact regarding his negligence  
7 claim, including whether Defendant had notice of the likelihood of injury. *Id.* at 6-  
8 7.

9 The Court grants Defendant's motion as to Plaintiff's § 1983 claim. Here,  
10 Plaintiff has sued the Washington Department of Corrections, an arm of the State,  
11 which is prohibited by *Will v. Michigan Department of State Police*, 491 U.S. 58,  
12 71 (1989) ("We hold that neither a State nor its officials acting in their official  
13 capacities are 'persons' under § 1983.").

14 However, the Court denies Defendant's motion as to Plaintiff's negligence  
15 claim due to genuine disputes of material fact. Here, Plaintiff argues that he  
16 attempted to call for help while he was being threatened with assault; found help  
17 but was then ordered back to his cell after attempting to report the assault; and  
18 finally, returned to his cell and was assaulted. Defendant, on the other hand, argues  
19 that Plaintiff's assault was a heat-of-the-moment incident and that its officers had  
20 no advance warning that it was going to happen. This factual dispute is sufficient  
21 to preclude summary judgment.

22 Finally, because the Court is dismissing Plaintiff's federal law claim and the  
23 parties are not diverse, the Court no longer has subject matter jurisdiction over the  
24 action. 28 U.S.C. §§ 1331-32. Thus, the Court remands the case to state court.

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**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT # 5**

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Defendants' Motion for Summary Judgment, ECF No. 13, is  
3 **GRANTED in part and DENIED in part.**

4 2. Plaintiff's negligence claim is **REMANDED** to the Spokane County  
5 Superior Court.

6 3. The District Court Clerk is directed to enter this Order and forward  
7 this file with a copy of this Order to the Clerk of the Spokane County Superior  
8 Court.

9 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter  
10 this Order, provide copies to counsel, and **close** the file.

11 **DATED** this 18th day of May 2021.



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17 Stanley A. Bastian  
18 United States District Judge  
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